S383-1

Calendar No. 519

100TH CONGRESS *1st Session*	SENATE	REPORT 100-275

UNITED STATES-JAPAN NUCLEAR COOPERATION AGREEMENT

JANUARY 20, 1988.—Ordered to be printed

Filed, under authority of the order of the Senate of December 22 (legislative day, December 15), 1987

Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. Con. Res. 96]

The Committee on Foreign Relations, having had under consideration an original resolution to express the sense of the Congress on the proposed revision of the United States agreement for nuclear cooperation with Japan, reports favorably thereon and recommends that the concurrent resolution do pass.

PURPOSE

The purpose of this resolution is to express the opposition of the Committee on Foreign Relations to the present draft of the Proposed Agreement Between the United States and Japan Concerning Peaceful Uses of Nuclear Energy.

BACKGROUND

On November 9, 1987, the President submitted to the Congress a Proposed Agreement Between the United States and Japan Concerning Peaceful Uses of Nuclear Energy. The President included in his letter of transmittal assertions that the agreement meets all requirements of the Atomic Energy Act (AEA), as amended, and

therefore automatically takes effect upon completion of 30 days of continuous session provided for committee review as specified under 123(b) of that act, plus 60 more days of continuous session provided for under section 123(d) for committee and Senate consideration.

During the initial 30-day review period, the Committee on Foreign Relations, after an extensive hearing and detailed analysis of the proposed agreement, concluded that it is not consistent with Section 123 of the Atomic Energy Act of 1954, as amended. Therefore, on December 17, 1987, the committee voted 15 to 3 to send a letter (see appendix) to the President citing the specific provisions of the law violated by the proposed agreement, with a finding that the agreement must be either renegotiated or resubmitted with an exemption from appropriate provisions of section 123 of the act. In the latter case, the agreement would not automatically take effect after the 90-day review period, but would require a positive vote of approval by both Houses of the Congress. A majority of the House Foreign Affairs Committee also forwarded a letter to the President expressing similar reservations.

The objections of the Senate Foreign Relations Committee were not directed against the trustworthiness of Japan as an ally of the United States. Japan has a rapidly growing nuclear industry, with materials and technology largely deriving from United States origins. All but one of Japan's present nuclear power plants are based on United States technology and use uranium for fuel. According to the agreement before the committee, the shipment of the plutonium reprocessed in Europe would be via a polar route to Japan. The likely route would be over Canada and Alaska, with a refueling stop there, or—if the Canadians do not agree—over northern United States States with possible refueling in the State of Washington or elsewhere on the west coast. Shipments could begin in about a year, and might involve two to three flights per month in the 1990's. Each flight could carry as much as 300 pounds of plutonium with some 15 kilograms per shipping cask. Tens of tons of plutonium might cross U.S. airspace over the term of the agreement.

The committee supports continued United States nuclear cooperation with our Japanese ally, which currently takes place on the basis of an agreement that expires in the year 2003. We welcome continued nuclear trade with Japan, which is governed by long-term contracts, and we endorse continued case-by-case reviews of Japanese industry requests for research use of plutonium. But we oppose the proposal to abandon the consistent U.S. policy, initiated by President Gerald Ford, of discouraging premature commercial plutonium use until adequate safeguards are developed to protect American antiterrorist, nonproliferation, and environmental concerns.

The committee believes that the proposed agreement poses extraordinary environmental hazards, a substantial proliferation peril, and a dangerous invitation to nuclear terrorism. Plutonium is among the most toxic elements known to man. The inhalation of mere specks of the element, for example, is sufficient to cause lung cancer. In its purified form it can be and is used as an essential material for atomic bombs and is the fissionable explosive element

which triggers the hydrogen bomb. It is not an element found in nature, but is created as a byproduct of reactions in nuclear power facilities. It decays very slowly, over tens of thousands of years. Dangers presented by plutonium include the risks of nuclear accident, diversion, and terrorism.

Because plutonium does present such enormous risks, the United States has taken strong measures to control the use, storage, and movement of plutonium, including the abandonment in the 1970's of efforts to establish a nuclear fuel cycle relying on the commercial use of plutonium. Every President since Gerald Ford has maintained a fundamental policy of minimizing the nuclear risks associated with the commercial use of plutonium. The Congress embodied this policy in the Nuclear Non-Proliferation Act of 1978 and the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986. Explicit in these acts are stringent nuclear proliferation controls to ensure that any proposed agreement provide "timely warning" of possible diversion of nuclear materials, minimize the amount of weapons-grade nuclear material in international transit, ensure adequate physical security of nuclear materials wherever located, and not be inimical to the defense and security of the United States.

LEGAL COMMENTS

The Atomic Energy Act of 1954 (AEA) had among its principal purposes the establishment of a framework for international cooperation to make available the benefits of peaceful applications of atomic energy, consistent with technological developments and considerations of common defense and national security. In 1978, the Congress enacted the Nuclear Non-Proliferation Act (NNPA) which was intended to advance the cause of international cooperation for peaceful nuclear activities while simultaneously preventing proliferation through effective control over exports of nuclear materials, equipment, and technology.

Basic to such cooperation with another nation or group of nations is the agreement for nuclear cooperation, an executive agreement authorized by the governing law [42 U.S.C.S. 2014(b)]. This agreement must contain provisions which meet essential nonproliferation criteria [42 U.S.C.S. 2153(a)(1)–(9)] and must be entered into pursuant to a specified procedure [42 U.S.C.S. 2153(d)]. The agreement provides the umbrella under which government or private cooperation may take place.

Two requirements mandated by Congress to be included in nuclear cooperation agreements [42 U.S.C.S. 2153(a) (5) and (7)], specifically state that the United States retain prior approval rights over transfers and reprocessing of nuclear materials. The proposed agreement with Japan contains in articles 4 and 5 provisions purporting to create requirements that special nuclear material will only be transferred or reprocessed "if the parties agree." However, article 1 of the implementing agreement provides for a blanket, life-of-the-agreement consent on the part of the United States to the reprocessing of spent nuclear fuel and the utilization of recovered plutonium in the Japanese civilian nuclear program. This consent is open ended, and is not limited to a "defined," concrete pro-

gram. Consent is provided for Japan to pursue, with little further control by the United States, a plutonium economy of its choosing—one that is open ended in terms of the quantities of materials involved and technologies employed. Without any requirement for United States approval, new bulk handling facilities in Japan for reprocessing, conversion, fuel fabrication, or other purposes may be added under the umbrella arrangement. Under article 2 of the implementing agreement, all that is required is "notification" by the Japanese that a facility is to be included under such arrangement. Within 30 days thereafter, the United States must provide its "acknowledgment" of the receipt of this notification. As long as there is an appropriate "statement" by Japan that safeguards are being applied at such facilities, the inclusion is automatic. Finally, in terms of plutonium use, permission is given in annex 1 to the implementing agreement to such use in essentially every existing Japanese reactor, while Japan is given a free hand in the future to add not just new, conventional reactors to the list but also new advanced reactors, such as fast breeder and high temperature gas thermal reactors. Again, all that is required is a simple notification to effectuate this result.

The consent embodied in this agreement will last for the next 30 years, without regard to future considerations, including both proliferation and terrorism risks. Such an abdication of authority by the United States is wholy contrary to the case-by-case review procedures mandated by the Nuclear Non-Proliferation Act and to the intent and spirit of that act.

Blanket authority for Japan to reprocess United States controlled spent fuel and to use the plutonium separated from that fuel without case-by-case approvals required by the present agreement, renders the "timely warning" criterion [42 U.S.C.S. 2160(b)(2)] of the Nuclear Non-Proliferation Act meaningless. This requirement provides that in approving requests to transfer and reprocess nuclear fuel, the administration must make a determination that such action "will not result in a significant increase of the risk of proliferation," giving "foremost consideration * * * to whether or not the reprocessing or retransfer will take place under conditions that will insure timely warning to the United States of any diversion well in advance of the time at which the non-nuclear-weapon state could transform the diverted material into a nuclear explosive device." The "timely warning" standard is a critical element of the act's safeguards regime.

The administration's treatment of this criterion undermines the intent of Congress in two fundamental ways.

First, it is patently impossible to predict today what conditions will be 30 years hence. While the administration claims that risks are slight because of Japan's nonproliferation stance, its defense posture and its economic situation, these claims are insufficient to provide the requisite assurance about risks in the year 2000 or beyond. This is why Congress intended that reviews of transfer and reprocessing requests be made on a case-by-case basis in light of foreseeable risks.

Second, while it claims that the timely warning criterion is met, the administration relies for this conclusion almost exclusively on nontechnical, political factors; i.e., Japan's nonproliferation stance,

its incentives and disincentives to develop nuclear weaponry and its geopolitical position. The reduction of the timely warning criterion to a political analysis runs contrary to what Congress intended. Indeed, "timely warning" becomes little different than the basic statutory determination, of "inimicality" under section 2160. However, statutes must be interpreted to give effect to all their terms, so that no part will be rendered "inoperative or superfluous," e.g., *American Textile Mfgrs. Inst.* v. *Donovan*, 452 U.S. 490, 513 (1981). It is plain that Congress intended for timely warning to be something more than a mere restatement of the inimicality test. Rather, Congress intended timely warning to be technically based criterion, judged in light of the workability of safeguards.

The NRC supported this position when, in a 1984 letter to the Secretary of Energy in connection with the first major shipment of United States controlled plutonium to Japan, it stated:

> In the Commission's view, the legislative history of the Nuclear Non-proliferation Act of 1978 (NNPA) indicates that Congress intended timely warning to be essentially a technical matter involving such factors as safeguards measures applied to the material and the technical ease of incorporation the material into a nuclear explosive device. Other, non-technical factors were to be considered relevant only in connection with making the overall statutory finding of no significant increase in the risk of proliferation.

The administration's approach to timely warning, which gives primacy to political assurances that diversion will not occur, essentially makes determination of safeguards effectiveness irrelevant. This is not what Congress intended when it enacted the Nuclear Non-Proliferation Act of 1978.

REASONS FOR COMMITTEE CONCERNS

The Committee on Foreign Relations expressed its serious reservations about several major areas in the agreement. These include:

(1) *Radical Departure from U.S. Policy.* In 1976, President Ford warned that "the accumulation of plutonium under national control, especially in separated form, is a primary proliferation risk." This belief forms the basis of America's sustained policy of requiring prior, case-by-case U.S. approval for the reprocessing or transfer of U.S.-origin nuclear material. This approach has allowed the United States to review carefully the physical security and safeguards conditions for each such "subsequent arrangement." The committee believes that this process is vital to the national security of the United States.

The proposed agreement would break with this tradition by permitting Japan to transfer and reprocess United States controlled spent fuel, and to the use the recovered plutonium for the next 30 years without requiring further United States approval. This "programmatic prior consent" encompasses transport casks not yet certified, shipping routes not yet identified, and nuclear facilities not yet even designed. The Nuclear Regulatory Commission (NRC) has estimated that 200–300 kilograms of plutonium—enough for roughly 50 nuclear weapons—

could remain unaccounted for each year at Japan's planned reprocessing facilities. Similar, unacceptably large discrepancies would occur at Japanese bulk handling facilities, according to the NRC. The risks of proliferation, terrorism, and environmental destruction posed by this agreement are as great as they are unpredictable. In short, the committee finds the proposed agreement an unprecedented and dangerous departure from U.S. nuclear export policy.

(2) *Inconsistent with U.S. Law.* In its December 17, 1987 letter to the President, the committee expressed its view that the proposed agreement does not meet the requirements of the Atomic Energy Act of 1954. The letter observes that "Section 123 of the Act [42 U.S.C. 2153] unqualifiedly requires that the United States retain prior approval rights in its agreements for cooperation over the transfer and reprocessing of nuclear material." The committee finds that the 30-year advance consent granted in the proposed agreement is totally incompatible with this section. We also have difficulty in sustaining the President's finding that the agreement "will promote, and will not constitute an unreasonable risk to, the common defense and security," given that the Department of Defense and the Nuclear Regulatory Commission have opposed the agreement in writing on national security grounds.

In addition, we do not believe that the "timely warning" criterion of the act has been satisfied. This section requires that foremost consideration be given to whether the United States will receive warning of a diversion "well in advance of the time at which the non-nuclear-weapon state could transform the diverted material into a nuclear explosive device." While assurance of timely warning clearly hinges on such technical matters as the effectiveness of safeguards and the ease of converting diverted material into a nuclear explosive device, the administration appears to have relied primarily on its judgment of Japan's intentions in determining that this requirement has been met. The act permits the President to consider such political factors in assessing the risk of proliferation posed by the agreement, but it does not allow these factors to be substituted for a technical determination as to whether timely warning could be provided.

(3) *Long-term advance consent (blanket authorization) to reprocess and use plutonium.* U.S. agreements for nuclear cooperation (with the exception of the current U.S.-Euratom agreement) require U.S. consent for subsequent use of U.S.-supplied nuclear materials and equipment or materials deriving therefrom. In particular, spent fuel containing uranium enriched in the United States or from U.S.-supplied reactors cannot be reprocessed either abroad or within the country without specific authorization by the United States. Likewise, plutonium recovered from such spent fuel cannot be transferred without U.S. case-by-case permission. The proposed agreement with Japan contains a long-term approval which would permit Japan for an initial period of 30 years to reprocess and to use United States controlled plutonium with no further Washington approval unless the activity falls outside of the defined nuclear

program. The agreement encompasses plans for nuclear power plants not yet built or designed, routes and shipments not yet specified, and plutonium casks not yet designed. It is against U.S. national security interests to take such a leap of faith.

(4) *Physical security and safety for plutonium shipments.* The shipments are proposed to be by air, passing over Canada and Alaska with refueling stops likely in that State or in Washington, or elsewhere on the west coast. Deep concern about risks of plutonium release from accidents has already surfaced in the Alaskan State government. Administration sources say the long-term advance consent will require air transport of plutonium, but there is nothing to prevent Japan from proposing other modes of transportation on a case-by-case basis. Japan is reported to be developing special containers for air transport of plutonium. But these have not yet survived tests, and they have not yet been submitted to the U.S. Nuclear Regulatory Commission for licensing. The proposed agreement also assumes an ability to predict the capabilities of terrorist groups 30 years from now when 30 years ago no one could predict the level of terrorist activity today.

(5) *Terms for Suspending the Agreement.* While the proposed agreement could be suspended by the United States unilaterally, we are concerned that the terms of this suspension right are such that it can never be exercised. Suspension of the agreement is to occur only "in the most extreme circumstances of exceptional concern from a non-proliferation or national security point of view," and even then the suspended party is required to "carefully consider the economic effects of such suspension." We share the Nuclear Regulatory Commission's (NRC) belief that "Japan's economic issues or impacts should be subordinate to consideration of United States national security and non-proliferation issues."

(6) *Return of Plutonium.* The proposed agreement allows the Japanese to require, in the event of a breach of the agreement by the United States, the return of plutonium derived from Japanese material or technology transferred to the United States under the agreement. The NRC and the nuclear industry, therefore, must assume the burden of tracking all nuclear materials in the United States that come into contact with Japanese components imported under the agreement. In the event that Japan were to claim that a United States violation of the agreement had occurred, the United States would be in the untenable position of transfering substantial quantities of weapon-usable plutonium to a non-nuclear-weapon state.

COMMITTEE ACTION

On December 15, 1987, the committee held a hearing on the Proposed Agreement Between the United States and Japan Concerning Peaceful Uses of Nuclear Energy. Testimony was received from the following individuals: (1) Senator John Glenn (D. Ohio); (2) The Honorable Gaston Sigur, Assistant Secretary of State for East Asian and Pacific Affairs; (3) The Honorable Richard T. Kennedy, Ambassador at Large and Special Adviser to the Secretary of State

on Non-Proliferation Policy and Nuclear Energy Affairs; (4) Norman A. Wulf, Acting Assistant Director for Nuclear and Weapons Control, Arms Control and Disarmament Agency; (5) Paul L. Leventhal, President, Nuclear Control Institute, Washington, DC; and (6) John W. Katz, Director for State-Federal Relations and Special Counsel to the Governor of Alaska, Washington, DC.

On December 17, 1987, the committee received additional testimony on the agreement from The Honorable Richard T. Kennedy. That same day, the committee considered the agreement at its business meeting. During the committee's consideration of the agreement, Senator Cranston made a motion to send to the President a letter indicating the committee's unhappiness with the agreement. The Cranston motion was voted on and approved 15–3. Ayes: Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Helms, Kassebaum, Boschwitz, Pressler, and Murkowski. Nays: Senators Trible, Evans, and McConnell. A second Cranston motion was made to have the committee report out an original resolution returning the proposed agreement with Japan to the President. This motion carried by an identical vote of 15–3.

ADDITIONAL VIEWS OF SENATOR JESSE HELMS

Japan is a friend and a valued ally but it has a problem: international terrorists are taking advantage of the fact that Japan does not have an espionage law. Last month North Korean terrorists operating from Japan with forged Japanese passports placed a bomb on a civilian airliner and sent 115 people to their deaths. One of Japan's leading newspapers noted last year that North Korean agents had even kidnapped Japanese couples from Japanese beaches when they spotted the agents making their secret landings. Without an espionage law Japanese police are severely handicapped in their efforts to capture and control international terrorists.

Weapons grade plutonium in the hands of terrorists may be the ultimate horror. It is therefore incumbent upon us to ensure that they do not get their hands on such materials. The committee report, which I endorse, notes that the proposed agreement presents "a dangerous invitation to nuclear terrorism." The current agreement contains case-by-case authority for nuclear reprocessing and does not expire until the year 2003. Given the very real problems of North Korean terrorists operating from Japan, the current agreement should remain in force until Japanese authorities can show, through the passage of an espionage law, that Japan will no longer be a haven for spies and terrorists.

JESSE HELMS.

ADDITIONAL VIEWS OF SENATOR DANIEL J. EVANS

I am very disappointed by the way in which the committee considered this important agreement for nuclear cooperation with the Government of Japan. This agreement was submitted by the President to the Congress on November 9, 1987, yet a hearing wasn't scheduled until the afternoon of December 15. Furthermore, the full committee had less than one hour to consider and debate the provisions of the agreement during a markup session. A motion by the committee to approve sending a letter to the President disapproving the agreement is unusual in itself. Even more unusual and troublesome was the committee's decision to send an original concurrent resolution to the full Senate which had not been written, had not been placed on the agenda, and had not been reviewed by any member of the committee or staff.

This is an extremely important agreement that has been painstakingly negotiated with the Government of Japan for about 6 years. This is the most comprehensive agreement for nuclear cooperation with any foreign government that has been negotiated since Congress passed the Nuclear Non-Proliferation Act of 1978 containing more stringent requirements for safeguards, and for the rights of retransfer and reprocessing. I know there are those who assert that the administration should have made greater efforts to consult with this committee throughout the negotiations of this agreement. Nevertheless, I am deeply troubled by the cavalier and overly politicized manner in which the committee considered this agreement. The committee has made a mockery of the "consultative" process envisioned in Section 123(b) of the Atomic Energy Act.

I find it incredible that a majority of members of the committee have concluded that this agreement does not meet the statutory requirements regarding nonproliferation contained in section 123(a) 1-9 of the Act. Indeed, a strict reading of the statute, as modified by the Proxmire amendment in 1985 (Public Law 99-64), section 301(a)(2)), gives the committee the authority only to review "the consistency of the terms of the proposed agreement with all the requirements of this chapter * * *" (section 123(b)). This means the committee's review of the proposed agreement during the 30-day period, following November 9, 1987, should focus solely on how the condition and consent rights in the agreement conform with the requirements in section 123(a); especially the requirement for rights of consent given for reprocessing, enrichment and alteration of the material; for the safeguards of facilities; and for retransfer of the material. The law intends the full Senate and House to focus on the more global debate of if and how the proposed agreement, in the determination of the President, "will promote, and will not constitute an unreasonable risk to the common defense and security."

Unfortunately, this committee has jumped the gun in its letter to the President and already appears to have prejudged that question.

Ambassador Richard Kennedy, in his testimony before the committee, described in detail how the administration believes that this agreement conforms with the statutory requirements of the law. Unfortunately, his words fell upon deaf ears in the committee. Clearly, each of the consent rights and guarantees called for by section 123(a) are contained in the agreement, a fact which the committee should have recognized. The only point at issue is the manner in which these rights are carried out in the accompanying implementing agreement. The President's decision to offer advance, long-term consent to Japan for activities relating to the plutonium fuel economy has been the focus of much discussion over the past 6 years. I believe that the administration has made a solid, well-founded case for the basis in law of this proposal. The reasoning of the administration is contained in a reply to an inquiry from the General Accounting Office, dated December 3, 1985.

In brief, the arguments for advance, long-term consent are: (1) the Atomic Energy Act expressly contemplates approvals long in advance of an activity; (2) such approvals may be contained in an agreement for cooperation; (3) three agreements for cooperation have already been concluded containing this feature (Norway, Finland, and Sweden); (4) the specific approvals provided for in the agreement with Japan satisfy all applicable procedural and substantive requirements and will enjoy greater congressional review than if provided outside of the agreement; and (5) the timely warning factor has been fully and properly considered in arriving at the judgment that the agreement will not create a significant increase in the risk of proliferation.

Opponents have countered by claiming that current law requires "case-by-case" or "shipment-by-shipment" approval for all of the activities (reprocessing; retransfers; safeguards of facilities) contemplated by Japanese entities using plutonium or highly-enriched uranium. This is simply not true since there is no provision in current law that requires "case-by-case" consideration. What the law does require is that U.S. approval satisfy specific, substantive nonproliferation and national security standards in any agreement or subsequent arrangement with a foreign country. I believe the administration has amply demonstrated to the committee the manner in which it does satisfy these requirements and therefore the purpose of the 30-day period has been fulfilled.

The basic rationale of opponents to this agreement appears to be that they do not wish to see the sovereign nation of Japan establish a large-scale, comprehensive nuclear fuel cycle with plutonium fuel recycled in fast breeder reactors. While I respect the advocacy of such a position within the United States, such a rational for opposition to this agreement is certainly not a legal objection and is one that doesn't recognize the realities of energy policies in Japan, or for that matter, other countries as well.

This agreement establishes an overall framework, a box if you will, within which the United States and Japan are obligated to cooperate on determining the proper safeguards and physical protection and security for the use of plutonium in Japan (recovered from U.S.-origin material). When these discussions began in 1982, the

Japanese side understandably wanted greater predictability and certainty from the U.S. Government as it develops and builds the necessary facilities to close the "back-end" of its nuclear fuel cycle. The U.S. side, recognizing Japan's ambitious nuclear program and its vital role in Japan's overall, long-term energy policy, wanted to enhance its ability to require enhanced safeguards on plutonium-handling facilities and stricter physical protection and security. The proposed agreement reasonably satisfies the goals of both parties.

The law requires the Arms Control and Disarmament Agency Director to review the proposed agreement's terms and conditions in light of the NNPA's enhanced requirements and submit an unclassified report to the Congress along with the President's submission of the agreement (H. Doc. 100–128). Incidentally, the submission of an unclassified Nuclear Proliferation Assessment Statement (NPAS) is not required under the 15-day period of review for "subsequent arrangements" governing the existing United States-Japan Nuclear Cooperation Agreement. The disapproval of this agreement by Congress would mean that such assessments from ACDA, as well as mandatory congressional hearings and direct Presidential involvement, would not be required in the future for such Japanese activities. For instance, one should note this committee has never formally objected to the annual extensions (originally, a 3-year determination following passage of NNPA in 1978) of the determination concerning the safeguard ability of the existing Tokai reprocessing plant.

In the conclusion of the ACDA assessment, submitted by Director Adelman to the President on October 1, 1987, he states: "ACDA believes that the new agreement, including the long-term consent arrangement, is in U.S. nonproliferation interests." ACDA fully acknowledges that the proposed agreement for cooperation for Japan is "unprecedented in the nature and scope of the advance, long-term consents and approvals which it contains." Yet "unprecedentedness" by itself does not provide sufficient grounds, in the view of ACDA, to recommend disapproval of the agreement to the President. It cites the following reasons:

> First, the new agreement for cooperation contains the expanded controls required by the NNPA.
>
> Second, it involves a country that is a close ally of the United States and which has an advanced nuclear program and excellent nonproliferation credentials.
>
> Third, *the agreement and implementing arrangement contain significant improvements in safeguards and physical protection measures.* (emphasis added)
>
> Fourth, the United States reserves the right to suspend the advance consent arrangement if circumstances develop which result in a risk to U.S. national security or nonproliferation interests.
>
> Finally, the entire agreement and implementing arrangement place United States-Japan nuclear relations on a solid and stable footing for the foreseeable future, which we believe will significantly strengthen the nonproliferation regime.

It then goes on to conclude:

> 1. The safeguards and other control mechanisms and the peaceful use assurances contained in the proposed Agreement are adequate to ensure that any assistance furnished thereunder will not be used to further any military or nuclear explosive purpose.
> 2. *The proposed agreement meets all the legal requirements of the Atomic Energy Act and the NNPA.* (emphasis added)
> 3. Execution of the proposed agreement would be compatible with the nonproliferation program, policy, and objectives of the United States.
> 4. It is recommended that the President determine that the performance of the proposed agreement will promote, and will not constitute an unreasonable risk to, the common defense and security; and that the President approve and authorize the execution of the proposed agreement.—(Views of the Director of ACDA; pp. 255–6 of H. Doc. 100–128).

The administration also carefully considered the question of "timely warning" (of diversions of plutonium from civilian to military uses) in the proposed agreement. It concludes that the proposed agreement, along with the implementing agreement and subsequent arrangements, will not result in a significant increase in the risk of proliferation. The administration's approach is to rely on a broad range of factors, including political and attitudinal, as well as the usual "technical means." I believe the administration's approach is sensible and well-founded in law. It recognizes the particular and unusual problems of detecting a "timely warning" of a potential diversion, and attempts to fashion a comprehensive approach in this agreement. As Ambassador Kennedy stated in his testimony:

> We took into account a broad range of technical, political and economic factors. We considered the nature of the effort that would be required if Japan were to decide to develop a nuclear explosive device, together with the technical, industrial, material and human resources available to Japan were it to implement a diversion decision. We considered the indicators that might be expected to provide timely warning, including the application of IAEA safeguards, and the probability of changes in such indicators as Japan's adherence to the NPT (Nonproliferation Treaty), its status as a U.S. ally, its stable and democratic government, and the transparency of its nuclear program. These factors all provide evidence that the United States would have timely warning as evisioned in section 131(b)(2) in the case of Japan * * * (pp. 18–19 of Kennedy testimony to Senate Foreign Relations Committee; December 15, 1987).

Certainly, if the world changes and Japan decides to renounce the NPT and its adherence to IAEA safeguards, the United States would have to reassess its position. That fact is self-evident.

Throughout the 30-year duration of the agreement, the United States retains the unilateral right to suspend its consents embodied in the implementing agreement, pursuant to article 3 of that agreement. This article was included on the insistence of U.S. negotiators and adequately protects the nonproliferation interests of the United States should circumstances in Japan change sufficiently to warrant suspension. Opponents have asserted that the unilateral suspension right is excessively conditioned on "economic" and other mitigating factors. I suspect they have not carefully read Article 3 of the Implementing Agreement. As ACDA states: "ACDA believes that this unilateral suspension right is *clear and unequivocal, thus ensuring that our supreme national interests are protected.*" (emphasis added; p. 245 of H. Doc. 100–128).

I believe the 30-year duration of the agreement is in the long-term, nonproliferation interests of the United States and should be viewed as a substantial achievement for U.S. negotiators. The proposed agreement ensures that the United States will remain an important player in Japan's nuclear program for a long period of time. The alternative is to reject this proposed agreement and allow Japan to proceed on its own with decreasing U.S. participation and leverage, i.e., to shoot ourselves in the foot. It is absolutely clear that Japan intends to achieve an independent nuclear fuel cycle by the end of this century. The development of a commercial reprocessing facility, planned for Rokkasho in Aomori of northern Japan, is already underway. The operation of commercial-size enrichment facility is scheduled to begin within a decade (a prototype facility has already been built and is operating at Ningyo-toge). Hence Japan is already well on the road to establishing an independent fuel cycle within the next decade or two. It will no longer need to contract with authorities in Great Britain, France, and eventually perhaps the United States, for the majority of those services.

I believe the question is the following: Do we wish to be an active, meaningful player in Japan's nuclear fuel program, or do we wish to withdraw from such participation? We must face reality and try to separate our views about the desirability of a plutonium fuel economy from U.S. obligations under the law. I am inclined to support the former proposition and believe that the proposed agreement does indeed conform with the statutory requirements in the NNPA.

Prior to consideration by the full Senate, I intend to review more carefully certain provisions of the agreement, its implementing agreement, as well as the many minutes and side letters in considering their effect on our broader national security interests. I think that is what Congress intended for congressional review during the 60-day period. I believe that the proposed agreement does meet with statutory requirements of current law, and that therefore the committee should report the proposed agreement to the floor of the Senate for its consideration. To do more or less than that is beyond the authority of this committee. The committee's decision to send a letter to the President indicating certain views is an unfortunate sideshow. If opponents are serious about their disagreements with the proposed agreement, they should get on with the main act: drafting and obtaining the necessary support for a joint resolution

of disapproval. It is unfortunate that opponents chose the tactics of a sideshow, and didn't offer a joint resolution of disapproval for the committee's consideration. In any case, the full Senate must eventually consider such a joint resolution as the ninety-day period continues to proceed. I intend to argue strongly against such a resolution of disapproval on the floor, if and when we consider it.

DANIEL J. EVANS.

APPENDIX

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC, December 17, 1987.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: In accordance with the provisions of Section 123b. of the Atomic Energy Act of 1954, as amended, 42 U.S.C. S2153(b) (the "Act"), we are writing to advise you that the Senate Foreign Relations Committee has concluded that the proposed Agreement for Cooperation between the Government of the United States of America and the Government of Japan Concerning Peaceful Uses of Nuclear Energy, submitted to the Congress on November 9, 1987 (the "Agreement"), is not consistent with Section 123 of the Act. The Committee respectfully requests that you renegotiate the Agreement to bring it into conformity with U.S. law. If the Agreement is not renegotiated, then it must be resubmitted to the Congress with an exemption of statutory requirements, in accordance with Section 123a. of the Act, and must await affirmative action by Congress through enactment of a joint resolution of approval.

As made clear in the Conference Report accompanying the 1985 amendment to the Act, "(t)he Congress fully expects * * * that the President will resubmit any agreement for which he has not submitted an exemption if either (Foreign Affairs) Committee during the prior consultation period recommends that an exemption is required."

In submitting the Agreement to Congress, your Administration expressed the conclusion that the Agreement "meets all statutory requirements". The Committee cannot accept this assertion. The proposed Agreement would provide for thirty-year advance consent of extraction, transport and widespread commercial use of plutonium by Japan—activities which, as the Administration itself states, are "unprecedented in * * * nature and scope. * * *" In our judgment, Section 123 of the Act unqualifiedly requires that the United States retain prior approval rights in its agreements for cooperation over the transfer and reprocessing of nuclear material. While the Administration asserts that these requirements are met, the Implementing Agreement exercises in Article 1 the consent rights provisions on a one-time basis for the life of the Agreement, a proposal totally incompatible with the provisions of the Act.

The Committee also has serious reservations about the finding that the Agreement will promote, and will not constitute an unrea-

sonable risk to, the common defense and security—inasmuch as this determination was made arbitrarily in the face of serious, written objections from both the Department of Defense and the Nuclear Regulatory Commission. The Committee also finds fault with the Administration's interpretation of the Act's requirements with regard to the "timely warning" criterion. Congress intended in the Nuclear Non-Proliferation Act for timely warning to be something more than a mere restatement of the general test of "inimicality" which the Act provides for subsequent arrangements. Rather, Congress intended timely warning to be a technically-based criterion, judged in light of the workability of safeguards and physical security measures. Since the Administration has not made such a determination, we do not believe that the exercise of consent rights in the Agreement is consistent with the requirements of Section 131b.(2) of the Act. Consequently, the safeguards and physical security criteria of Section 123 of the Act are not met.

The Committee is deeply concerned about the major policy implications of the precedents which would be established by entry into force of this Agreement. Testimony taken by the Committee indicates that the U.S. is preparing to give blanket authorization for the next 30 years to air-shipment of several hundred kilograms of weapons-usable plutonium each month over and through U.S. territory. Before embarking on such a perilous course—which could seriously jeopardize our nonproliferation interests while posing a grave environmental risk—we wish to consult with the Administration very closely. It is therefore our purpose in this letter to stop the "ninety day clock", and to begin a good faith dialogue with all parties on how the fundamental deficiencies in the Agreement can be corrected.

The Committee has reached these judgments of the basis of its own investigations, as well as its lengthy hearing conducted on December 15, 1987. Accordingly, the Committee finds that the Agreement must either be renegotiated, or, at a minimum, resubmitted with an exemption from the appropriate provisions of Section 123 of the Act. The Committee requests that your Administration communicate its intentions to the Chairman and to the Ranking Republican Member by January 11, 1988, in order to provide sufficient time to consider necessary legislative action and other remedial options.

Sincerely,

CLAIBORNE PELL,
Chairman.
ALAN CRANSTON,
Chairman, Subcommittee on Asia and Pacific Affairs.
JESSE HELMS,
Ranking Republican Member.
FRANK H. MURKOWSKI,
Ranking Republican Member, Subcommittee on Asia and Pacific Affairs.
JOHN F. KERRY.
PAUL SIMON.

PAUL SARBANES.
DANIEL P. MOYNIHAN.
NANCY LANDON KASSEBAUM.
RUDY BOSCHWITZ.
TERRY SANFORD.
BROCK ADAMS.
CHRISTOPHER J. DODD.
LARRY PRESSLER.
JOSEPH R. BIDEN, Jr.

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